Supreme Court, U.S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

80-219

In the Supreme Court of the United States

October Term, 1980

No. 80-219

BIG BEAR SUPERMARKETS No. 3,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERVENOR STATUS OF LOCAL 229

Amalgamated Meat Cutters and Butcher Workmen of North America, Local 229 was the Intervenor in the action below. Pursuant to U.S. Sup. Ct. Rule 21, Local 229 is a party to these proceedings. Local 229 will hereinafter refer to itself as "Intervenor."

QUESTIONS PRESENTED

The petition for certiorari sets forth the first question presented in a manner which begs the real question. By stating that the question presented is

> "whether the inconsistent decisions of the Ninth Circuit Court of Appeals in *NLRB v. Big Bear Supermarket No. 3* and in *NLRB v. Transcontinental Theaters, Inc.*, obfuscate the law governing franchise agreements and thereby impair the right to contract,"

the Petitioner assumes that the decisions in the two cases cited are inconsistent. The real question presented by the petition is whether the decisions of the Ninth Circuit Court of Appeals in *NLRB v. Big Bear Supermarket No. 3* and *NLRB v. Transcontinental Theaters, Inc.*, are inconsistent.

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No. ——

BIG BEAR SUPERMARKETS NO. 3,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ARGUMENT

I

The Petitioner misconstrues the Function of the Courts in Reviewing the Board's Decisions.

At the outset it is necessary to point out that the Petitioner appears to have a basic misunderstanding of the functions of both this Court and the appellate court in reviewing the decisions of the National Labor Relations Board.

The Petitioner implies that both the *Transcontinental* and *Big Bear* decisions are wrong because they hold that the provisions of a franchise agreement are relevant only insofar as they are actually exercised, thereby requiring the Court of Appeals to "step outside its purview and examine specific facts each time it reviews a franchise agreement" (Petition, Page 8). This assumes that the function of the Court of Appeals is to review franchise agreements. As this Court recognized in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the function of the courts of appeal in reviewing Board decisions and orders is to determine whether on the record as a whole there is substantial evidence to support the Board's findings. Obviously, then the Court of Appeals is not "stepping outside its purview" when it examines facts other than the franchise agreement itself in order to determine whether the Board's findings as to the nature of the relationship are supported by substantial evidence.

The Petitioner also implies that it is the function of this Court to assist prospective franchisors and franchisees in drafting their agreements by establishing "a uniform set of rules applicable to franchise agreements." This puts the Supreme Court of the United States somewhat in the position of house counsel to prospective franchisors and franchisees, charged with the responsibility of drafting their agreements for them. Imposing such a responsibility on this or any other court places an intolerable burden upon the judicial system, particularly in light of the myriad types and varieties of relationships potentially involved. In any event, as the discussion below will show, there is no present lack of uniformity resulting from the opinions of the Ninth Circuit Court of Appeals in the *Transcontinental* and *Big Bear* cases.

II

There are No Conflicts in the Two Decisions Cited Warranting the Granting of Certiorari.

The Petitioner asserts that in the *Transcontinental* and *Big Bear* cases the Ninth Circuit Court of Appeals reached opposite conclusions based on "virtually identical franchise agreements" (Page 7). This statement blatantly assumes a similarity in the two agreements which is not evident from the decisions cited and ignores the factors other than the agreements themselves which were considered by the court in each case. The Court of Appeals specifically recognized the existence of substantial differences between the facts in the two cases in the amendment to its decision in the *Big Bear* case (See Appendix, Petition at Page 36).

Again, it must be recalled that the function of the Court of Appeals in the *Transcontinental* and *Big Bear* cases was not to make a *de novo* determination of the nature of the relationship, but rather to decide if the determination previously made by the agency authorized by Congress to do so was supported by substantial evidence. For this reason the most useful method of analysis of the two decisions is to examine the factors relied upon by the Board in each case. By so doing one can ascertain what evidence the Court evaluated in reversing the Board in the *Transcontinental* case and upholding it in the *Big Bear* case. The Board's Decision in *Big Bear* is set forth herein at Appendix Page 1a. The decision in *Transcontinental* is set forth at Appendix, Page 30a.

In both cases the crucial point was whether the parties to the agreements in question had engaged in bona fide arms-length transactions. As the Board pointed out in its

decision at note 18, the application of the criterion of control over labor relations policies is premised upon the existence of such a bona fide, arms-length relationship. Thus, in both the *Transcontinental* and *Big Bear* decisions the Board first determined whether the relationship was a genuine arms-length contractual relationship. The Court of Appeals found the Board's decision holding the *Transcontinental* relationship that of an employer and employee was not supported by substantial evidence and reasonable inference. In *Big Bear* the Court did find substantial evidence and reasonable inference to find an alter ego relationship.

In each case the Board considered a number of factors, both with respect to the written agreements and to their practical application. A comparison of the factors considered clearly distinguishes the two cases and establishes that the two decisions are not in conflict.

Both the Transcontinental and Big Bear agreements provide for termination on short notice. However, there is an important difference. The Transcontinental lease could be terminated if the lessees did not operate at a profit or conduct the business in a businesslike manner (Appendix, Page 34a). The Big Bear agreement was terminable if Holmes did not request and receive approvals required by the agreement (Appendix, Page 9a). The items for which he was required to seek approval included changing product lines and purchasing advertising (Appendix, Page 9a).

The Transcontinental agreement permitted the lessor to assist Cynatron in bidding and selecting its films. There was no obligation for Cynatron to abide by Transcontinental's advice. Moreover, this right was never exercised

(Appendix, Page 47a). In contrast, Big Bear not only required Holmes to stock advertised goods at advertised prices, but also required Holmes to honor discount coupons appearing in Big Bear's purchased advertising, give trading stamps as long as the chain did so, and carry product lines customarily carried in Big Bear stores in quantities to be determined solely by Big Bear, (Appendix, Pages 8a-9a).

With respect to advertising, Member Kennedy notes that Cynatron had increased its advertising budget, indicating control over advertising (Appendix, Page 48a). In sharp contrast, Big Bear controlled and purchased the advertising for Holmes's store, permitting him to obtain additional advertising only with written permission (Appendix, Page 9a).

Although in both cases there was virtually no significant initial investment on the part of the lessees, there is a signifiicant difference in the financial dealings during the course of the relationship. Cynatron maintained its own bank accounts, books, and accounting system, although it did provide designated reports to Transcontinental so that Transcontinental could fulfill its obligation to provide such reports to the owner of the shopping center in which the theater was located (Appendix, Pages 46a, 49a). Cynatron was solely responsible for paying its own obligations, including its obligation to Transcontinental (Appendix, Page 49a). On the other hand, all of Holmes's receipts were collected and controlled by Big Bear which advanced all operating expenses and merely debited the store account (Appendix, Pages 10a-12a).

A number of factors were considered by the Board in *Big Bear* which did not exist in the *Transcontinental* case. Holmes is the son of a member of Big Bear's Board of

Directors who is also the owner of five percent of Big Bear's stock. He is afflicted with a progressive disease which was said to have interfered with his previous job as manager of one of the stores in the Big Bear chain (Appendix, Page 7a). The two Cynatron partners had no previous relationship with Transcontinental (Appendix, Page 44a). Big Bear owns the shopping center on which Holmes's store is located (Appendix, Page 6a). Transcontinental was merely a lessee of two theaters in a shopping center (Appendix, Pages 31a-33a).

Perhaps most significant of all is the fact that while the Transcontinental agreement merely gives the lessor the right to come upon the property at reasonable times to inspect to see if the theaters are being properly run and maintained (Appendix, Page 35a), the Big Bear agreement provides that Holmes will be provided with no less supervision than any other markets in the Big Bear System (none of which were franchised) (Appendix, Page 9a).

It is obvious from the Board's decisions not only that the Court of Appeals was indeed considering totally different factual situations in each case, but also that the Petitioner's assertion that the two agreements were virtually identical is false.

The Petitioner asserts that the Court of Appeals found control over labor relations a crucial issue in *Transcontinental*, but dismissed it as irrelevant in *Big Bear*. The implication is that the two decisions are, therefore, inconsistent. That is simply not the case. In *Big Bear* the Court upheld the Board's application of the law cited earlier, i.e., the court agreed that the threshold consideration is whether a bona fide arms-length transaction exists. If it does, as the Court held in the *Transcontinental* case, then

control over labor relations becomes a crucial factor. If it does not, then the relationship is a sham, the two entities are really one and therefore there is no real separation of control to be discussed. This reasoning is not only sound, it is elementary.

Finally, the Petitioner claims that the decision in *Big Bear* is contrary to a prior Ninth Circuit decision in *Sakrete of Northern California, Inc. v. NLRB*, 322 F.2d 902 (9th Cir. 1964). According to the Petitioner, the court in *Sakrete* held that the criterion of common ownership or financial control was the least important of the four single employer criteria. Here again, Petitioner distorts the Court's reasoning. The Court did not hold that common management was the least important, merely that it was the least emphasized of the four criteria:

> "A discussion of the early development of this Board principle, and of the principal factors which the Board weighs in deciding whether there is the requisite integration to constitute two corporations a 'single employer,' is set out in the 21st Annual Report of the Board, pages 14-15, where this statement appears:
>
> " 'In applying the present jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.
>
> " 'The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:

"'1. Interrelation of operations

"'2. Centralized control of labor relations;

"'3. Common management; and

"'4. Common ownership or financial control.

"'No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.'" (Footnotes omitted.)

Moreover, it is significant that the discussion of the common management and control criterion and its relative significance in both *Transcontinental* and *Sakrete* was in the context of an analysis of single employer status for purposes of the Board's asserting jurisdiction, not as in the instant case, in the context of an allegation that the agreement was a sham intended to circumvent the original Employer's obligations under a collective bargaining agreement.

There is no conflict between the *Transcontinental* and *Big Bear* decisions. Both are sound, both are based upon the same well established principles applied to totally different facts.

Wherefore, Intervenor respectfully submits that certiorari should be denied.

Dated: September 4, 1980

DOMNITZ AND PROCHAZKA
A Professional Corporation

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APPENDIX

239 NLRB No. 26

JMT
D–4386
La Mesa, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

BIG BEAR SUPERMARKETS NO. 3
and Case 21–CA–15605
RETAIL CLERKS UNION, LOCAL 1222
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO
and Case 21–CA–15703
AMALGAMATED MEAT CUTTERS LOCAL
NO. 229, AMALGAMATED MEAT CUTTERS
& BUTCHER WORKMEN OF NORTH AMERICA,
AFL-CIO

DECISION AND ORDER

On February 24, 1978, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Parties Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, filed exceptions and supporting briefs. Respondent and the Intervenor, Richard Holmes,[1] filed briefs in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1 Holmes, who was alleged in the complaint to be the *alter ego* of Respondent, was permitted to intervene at the hearing.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent, a corporation engaged in the operation of retail grocery markets in San Diego County, California, owns and operates a chain of approximately 22 supermarkets, known as Big Bear markets, in that area. The corporate entity, designated as Big Bear Supermarkets #3, additionally owns and operates a number of other businesses.[2] Big Bear Supermarkets #3 has, since at least 1957 and 1950, respectively, been party to successive collective-bargaining agreements with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, herein called Local 1222, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein called Local 229, covering multistore bargaining units at its retail grocery and meat markets in San Diego County.[3] Prior to November 15, 1976, Respondent applied its contracts with Local 1222 and Local 229 to bargaining unit employees covered by these contracts at all Big Bear markets in San Diego County.

Effective November 15, 1976, Respondent franchised its Big Bear store 13, located in La Mesa, California, to

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2 These include 6 other grocery stores and markets operated under the trade names of Market Place and Cooks Markets, 9 Daisy's Restaurants, and 15 Par Liquor Stores, as well as several shopping centers.

3 Respondent's contracts with Local 1222, the most recent of which is effective from July 28, 1975, to July 30, 1978, set forth the specific job classifications constituting the unit appropriate for collective bargaining. Respondent's contracts with Local 229, the most recent of which is effective from November 8, 1976, to November 4, 1979, likewise set forth the job classifications included in the appropriate bargaining unit.

Richard Holmes, the Intervenor in this proceeding. Richard Holmes, a former store manager at another of Respondent's Big Bear markets, is the son of Gerald Holmes, a corporate officer of Respondent,[4] who is a 5-percent shareholder of Big Bear Supermarkets #3. Respondent had not previously, nor has it since, franchised any other of its operations.

Under the terms of the franchise agreement executed by the parties on November 8, 1976, Richard Holmes has exclusive control over the labor relations of the La Mesa store. In preparation for taking over the store's operation, Holmes recruited and hired a new complement of employees for that store, paying them wages and benefits less than those required under Respondent's union contracts. The 12 Big Bear employees working in the La Mesa store were transferred by Respondent to other of its Big Bear markets before Holmes commenced operation of the store as franchisee. Only one former employee of store 13, a part-time janitor who was not included in the bargaining unit under either of Respondent's union contracts, was retained by Holmes at the franchised store.

The parties have stipulated that Respondent's employees at the La Mesa store were transferred to other Big Bear stores without being given the opportunity to seek continued employment at the franchised store, as we note is required by Respondent's contract with Local

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4 Gerald Holmes is Respondent's general manager and secretary-treasurer, as well as a member of the corporation's board of directors.

1222.[5] The parties have further stipulated that Respondent neither notified nor bargained with the Unions representing these employees regarding the employees' transfer either before or after the transfers occurred. The parties additionally stipulated that Richard Holmes has refused to recognize either Local 1222 or Local 229 as the bargaining representative of the employees at the franchised store, and has also refused to apply the terms of Respondent's contracts with these Unions to the employees at the La Mesa store. He has declined as well to supply Local 1222 with the names and addresses of the store's current employees in the job classifications included in its bargaining unit when such information was requested by that Union. As a result of the employee transfers and of franchisee Holmes' subsequent refusal to recognize and bargain with these Unions as representatives of the employees at store 13, or to abide by the terms of Respondent's collective-bargaining agreements with Local 1222 and Local 229, both Unions filed the instant unfair labor practice charges.

The Regional Director for Region 21 consolidated the two cases and, on June 9, 1977, issued an amended complaint alleging that the La Mesa store is an *alter ego* of Big Bear Supermarkets #3. The gravamen of the General Counsel's contention is that Respondent's purported franchising of store 13 to Richard Holmes was, in actuality, a sham transaction motivated by Respondent's desire

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5 Art. XIX(D) of Respondent's contract with Local 1222 states as follows:

D. SALE OR TRANSFER

1. In the event of a sale or transfer of a store or stores, an employee shall be allowed a seven (7) day period from the date of announcement to the employees of the sale or transfer during which time he may determine whether he wishes to stay with the seller or whether he wishes to make application for employment with the new owner or transferee. In the event the employee chooses to remain with the seller, such choice shall not be construed as any guarantee of employment over and beyond the terms of this Agreement.

to transform a losing operation into a profitable one by avoiding its obligation to pay contractually agreed to union wages and benefits. Specifically, the General Counsel alleges that Big Bear retained and exercises such extensive control over the franchised operation as to render it in effect a subordinate entity and disguised continuance of Big Bear Supermarkets #3. Thus, the complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with Local 1222 and Local 229 as representatives of the employees at the La Mesa store; by refusing to honor its collective-bargaining agreements with these Unions with regard to those same employees; by withdrawing recognition from the Unions as collective-bargaining representatives of the employees in the separate units at the La Mesa store; by unilaterally transferring the previous employees of the La Mesa store to other stores of Respondent within the multi-store bargaining units, and without bargaining with the Unions over such transfers, because of their union representation; and by refusing to furnish Local 1222 with the names and addresses of current employees of the La Mesa store in job classifications included in its bargaining unit when such information was requested by that Union.

The Administrative Law Judge, rejecting the General Counsel's *alter ego* contention, dismissed the complaint in its entirety. Analyzing the instant case in terms of whether the two enterprises have substantially identical ownership and control and common business purpose, management, operations, equipment, customers, and supervision, the Administrative Law Judge concluded that these factors did not preponderate in favor of finding Richard Holmes to be the *alter ego* of Big Bear Super-

markets #3.[6] Nor, he concluded, did the evidence establish the selection of Holmes as franchisee to be a subterfuge by which Respondent would continue to operate the store. In addition, the Administrative Law Judge found that neither the transfer of all union-represented employees at the La Mesa store to other stores in Respondent's chain nor Respondent's failure to notify and bargain with the Unions representing those employees regarding their transfer and change in status of the store violated the Act. For the reasons set forth below, we disagree with certain of these conclusions, and therefore find that Respondent committed certain of the unfair labor practices alleged.

The *Alter Ego* Issue

The La Mesa store, as indicated in the Administrative Law Judge's Decision more fully describing the facts in this proceeding, is located in a shopping center which Respondent owns. This particular shopping center has been subject to three separate freeway construction condemnation proceedings by the State of California, shrinking its size from a total of some 13 acres in 1950 to less than 2 acres in 1976. The most recent condemnation and road construction, occurring in 1975-76, resulted in an approximate 25-percent sales drop for store 13, and in the elimination of a substantial portion of the store's parking area. Profit and loss statements show that the store declined from a fiscal 1974 profit of $1,580 to a fiscal 1975 loss of $52,507 and a fiscal 1976 loss of $55,320.

It was these financial losses, along with economic difficulties at some of its other operations, which Respondent

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6 These factors have previously been identified as being generally indicative of *alter ego* status. *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976); *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394 (1974).

asserts precipitated its decision to franchise the La Mesa store. Further influencing that decision, Respondent maintains, was its desire to retain its overall market share of the grocery business in San Diego County, and the need to keep the Big Bear name in its shopping center as a customer-drawing factor for the benefiit of its tenants in other stores and shops in the center. Thus, Respondent claims, the franchising of the store was a bona fide, arm's-length business transaction motivated by a desire to minimize its financial losses while achieving these related business objectives.

Selected by Respondent as franchisee was Richard Holmes, an employee of Big Bear Supermarkets #3 since 1969. The son of Gerald Holmes, a major officer and a shareholder of Respondent,[7] Richard Holmes was until November 1976 manager of a high volume Big Bear market in El Cajon. His ability to continue in that capacity was, unfortunately, limited by the fact that he is a victim of multiple sclerosis. The effects of this disease had necessitated his taking a leave of absence of about 4 months in 1975, and Holmes testified that the disease was affecting his ability to perform as a Big Bear manager in 1976. Rated by the Veterans Administration as 30-percent disabled, Holmes testified that multiple sclerosis is generally a progressive disease, depending upon the person and the kind of pressure he is under. Holmes has been aided in the operation of the franchised store by his wife and mother, who have worked at the store without pay.

The franchise agreement executed by the two parties was, according to Respondent's attorney who prepared the

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7 Approximately 80 percent of the stock of Big Bear Supermarkets #3 is owned by its president, John Mabee, with Gerald Holmes owning about 5 percent, and the remaining 15 percent being held primarily by supervisors of Respondent.

document, patterned after a 1966 copy of a Southland Corporation franchise agreement for a 7-Eleven store which the Board had found to create an independent contractor relationship between a franchisor and its franchisee.[8] While identifying several areas in which modifications to that document were made, including rent, advertising, termination, and inventory, Respondent avers that it basically merely incorporated the provisions of Southland's agreement in drafting Big Bear's franchise and leasing agreements.[9] (Major provisions of the Big Bear agreement are set forth verbatim in the attached Decision of the Administrative Law Judge.)

As a review of this agreement reveals, Big Bear retains under the contract terms a substantial number of controls over the operation of the La Mesa store. Thus, the agreement provides, for example, that (1) the La Mesa store is to be operated as part of Respondent's system of Big Bear stores; (2) Holmes is specifically obligated to carry such product lines as are customarily carried in the Big

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8 *The Southland Corporation, d/b/a Speedee 7-Eleven*, 170 NLRB 1332 (1968).

9 While we do not find it necessary to our decision herein to engage in an extensive comparison and analysis of the Big Bear and Southland Corporation agreements, we note significant variations between the two. Southland franchisees, for example, are required to pay a cash initial franchise fee at contract execution, as well as provide cash operational capital as an initial investment. They are also charged interest on open account items advanced by Southland, if they desire to finance their operation through Southland rather than from some other source. Big Bear, as discussed *infra*, has markedly different provisions regarding these items. (Any thorough and accurate comparison of Big Bear's contract with the Southland agreement, asserted by Respondent to have been its model, is precluded, however, by the fact that Respondent introduced into evidence only a copy of a Southland agreement dated July 1977, and the 1966 version claimed as the prototype for Big Bear's franchising contract was not made available as record evidence.) In any event, given the overall facts of this case, we do not find the situation of the Southland Corporation, which is an acknowledged entity in the franchising industry, to be analogous to that of Big Bear, which is not in the business of franchising and, indeed, aside from the La Mesa store has made no attempt to franchise its business units.

Bear system, and in such quantities as are reasonably necessary, *in the sole judgment of Big Bear*, to meet customer demands; (3) Holmes must obtain permission from Big Bear before changing any product line customarily carried in the Big Bear system; (4) Big Bear has the authority to contract for such advertising as it deems sufficient *in its sole judgment* and, while Holmes may purchase such additional advertising as he may desire, that advertising must be approved in writing by Big Bear and may not, *in the sole judgment of Big Bear*, be inconsistent with its advertising purposes; (5) Holmes must stock and sell advertised goods at the advertised prices and honor discount coupons contained in Big Bear advertisements; (6) Holmes is obligated to purchase and distribute trading stamps for so long as Big Bear gives them; and (7) Big Bear reserves the right to provide Holmes with supervision and technical assistance, and *in any event with no less supervision than is provided to other markets in the Big Bear system.* Holmes is moreover precluded from assigning, encumbering, mortgaging, pledging, or hypothecating his interest in the leasehold estate or equipment (although Big Bear's right to take the same actions with regard to the store's equipment and fixtures is retained), and from selling, transferring, or assigning his interest in the contract as well. A termination clause provides that Holmes may lose his franchise if he fails to request and receive any approvals required by the agreement, among several listed conditions justifying termination. Thus, the franchised store continues to operate essentially as any other Big Bear market, with Big Bear actively exercising its contractual prerogatives.

Also of import, particularly since Respondent asserts that the franchising resulted from valid economic considerations, are the financial provisions underpinning the

franchising agreement. For a downpayment of $2,000 and the execution of an unsecured promissory note in the amount of $114,400.81, Holmes took over a $116,400.81 inventory of goods and became the putative owner of this ongoing business operation having an annual sales volume well in excess of $1 million.[10] According to article 19 of the agreement, outlining the operation of the owner's open account, Big Bear pays for all expenditures required to be made in the operation of the business, and debits these to Holmes' open account. There is no requirement for the payment of interest on this account; therefore, Big Bear in actuality advances interest-free all moneys required for the store's operation – including so-called owner's investment costs of permits, transfer fees, business licenses, and "set up" fees.[11] Big Bear then collects and deposits Holmes' daily sales receipts, credits this income to Holmes' open account, and by virtue of the accounting services which it also provides determines the quarterly and, finally, yearly net operating income for apportionment between it and Holmes. As consideration for the lease, franchise, license agreement, utilities, and services to be performed by Big Bear, the agreement requires that Big Bear be paid a "Big Bear Charge" consisting of 40 percent of Holmes' net operating income.[12]

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10 The value of "goodwill" accruing to the new owner in his assumption of the business is not financially recognized in this document. In marked contrast, the purchase prices of two stores recently sold by Respondent included amounts of $40,000 and $100,000, respectively, over and above the value of inventory transferred.

11 Art. 18 of the agreement, which is not among those provisions included in the Administrative Law Judge's Decision, states as follows:

> 18. OWNER'S INVESTMENT.
> OWNER shall pay for all permits, transfer fees, business licenses, or any other "set-up" fees that may be necessary to take over the store and operate it. In addition, OWNER agrees to pay to BIG BEAR the cost of opening inventory as is provided in paragraph 17 above. These amounts shall constitute the OWNER'S investment. These costs shall be debited to OWNER'S Open Account as provided above.

12 Net operating income is defined as "gross gain less operating expenses."

Interspersed throughout the agreement are provisions whereby Big Bear commits itself to pay various items to be borne by Holmes under the contract's terms, debiting these payments to Holmes' noninterest-bearing open account. Thus, Big Bear obligates itself to pay all bills, invoices, or other obligations Holmes is required to pay under the maintenance and repair provisions for the leased premises and equipment; the rent itself for the building and fixtures is debited to the open account (since Big Bear owns the leased building and fixtures, it is in effect advancing the economic costs of these items by debiting Holmes' account); Big Bear agrees to advance Holmes sufficient sums to obtain all permits and licenses required by law for the store's operation; Big Bear agrees initially to arrange for fire and casualty insurance, debiting its cost to the open account; Big Bear is required, in addition to paying real property taxes under the agreement, to make the actual tax payments for Holmes' personal property taxes on the inventory and equipment, as well as the businesses' sales taxes, again debiting the open account; Holmes' pro rata share of the advertising and supervision Big Bear provides is to be debited to the account; Big Bear is obligated to pay and debit to his open account Holmes' state unemployment insurance, social security, payroll insurance, workmen's compensation insurance, and any other similar expenses relative to Holmes' employment relationship. As is apparent from all of the above, it is Big Bear and not Holmes providing the capital to operate the La Mesa store. Holmes would moreover appear under the agreement's terms to have no choice of obtaining his financing from any other source, a fact which we note without comment other than the observation that he would not appear likely to desire other financing with Big Bear financing the store's operation

interest free. It is, of course, relevant to a consideration of the alleged bona fide nature of the franchising transaction.

Holmes' unsecured $114,400.81 promissory note in payment for the store's initial inventory is payable $500 or more monthly, including interest at the rate of 5 percent per annum, until the note has been paid in full. At the end of each quarterly accounting, Holmes is required to make a principal payment on this note in an amount equal to 50 percent of his net profit until the cost of the initial inventory has been paid in full. There is no time limit as to when this principal amount must be fully paid. The Administrative Law Judge found it significant that Holmes had applied his total net profits, rather than only the half required by the contract, to the repayment of the principal on this note, as indicative that Holmes is truly a franchisee and the agreement is not a sham. A review of the record, however, indicates that the Administrative Law Judge was factually in error in this regard. Whereas Holmes did apply his total quarterly profits to payment of the principal on January 13 and April 20, 1977, on July 31, 1977, he paid on the note's principal only the half of his net profits mandated by the contract. Thus, whatever weight the Administrative Law Judge accorded this fact in reaching his conclusion would appear misplaced.

Another significant financial aspect of the transaction is reflected in article 21 of the agreement, relating to Holmes' "Draw on Anticipated Profits." This provision requires Big Bear to pay Holmes $425 each week, irrespective of whether or not the business is showing a profit. Moreover, the amount may be changed only upon the written request of Holmes and with Big Bear's approval, and may not be reduced either quarterly or at the

close of the fiscal year for lack of a profit. This amount, roughly comparable to the $18,500 to $23,000 annual salaries received by managers of Respondent's Big Bear markets, is also to be debited to Holmes' interest-free open account. Although the agreement refers to this payment as a "Draw on Anticipated Profits," the payment is totally unrestricted under the contract terms by any necessity of ever having any profits to draw on.[13] It would appear, rather, to operate as an open-ended salary guarantee with Big Bear again advancing these funds interest free.

Big Bear, as stated, avers that it entered into the franchising agreement in order to cut its financial losses at the La Mesa store.[14] The agreement does not, however, as described above, function to relieve Big Bear of an unprofitable operation. Richard Holmes paid Big Bear only $2,000 and his unsecured promissory note, the principal of which is essentially to be amortized from future profits, if any, of the store, for the Big Bear franchise. As a result of this transaction, Big Bear gained only $2,000 and a promise from Richard Holmes to pay for the other $114,400.81 worth of inventory provided him at some time in the future when the store makes money. Although the agreement requires Holmes to share in any losses of the store, if his open account reflects a balance due upon the termination of the agreement, the record contains no evidence that Holmes owns assets accessible for such

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13 The 1977 Southland agreement, in comparison, likewise provides for an owner's draw on anticipated profits, but reduces that draw if the draw plus the payroll for the store exceeds a stated percentage of net sales.

14 While Respondent's other asserted reasons for the franchising of the store; i.e., the desire to maintain its overall market share of the grocery business in San Diego County and to keep Big Bear in the shopping center as a customer-drawing factor, may explain why Respondent did not want to sell the store, they would appear to bear no logical relationship to how franchising could resolve this store's financial difficulties.

purpose. It does indicate, however, that he has pledged no other assets as security. Meanwhile, under the agreement Big Bear is committed to continue its general financing of the store's operation, by virtue of various provisions requiring it to pay all the bills, and the fact that Holmes pays no interest on these moneys advanced. Thus, any true entrepreneurial risks would appear to be borne in the first instance by Big Bear, rather than by Holmes.

Furthermore, franchising could not solve the major reason adduced by Respondent for the store's poor financial record. Big Bear President John Mabee testified that the store's volume had been "headed on a straight line up, and all of a sudden with the taking of the parking lot it leveled off and flattened – dropped and has sort of maintained a level line since that particular time," referring to the 1974 state condemnation and 1975-76 freeway construction at the store's locale which resulted in about a 25-percent drop in its sales volume. Franchising coluld hardly remedy a lack of parking space. Nor does the record contain any evidence that Holmes overcame this problem.

What was accomplished through the purported franchising, however, was a drastic reduction in the store's operating costs through avoidance of the application of Respondent's union contracts to the franchised store's employees. Thus, an examination of profit and loss statements for the store shows, for example, that whereas salaries and wages cost Big Bear $174,204, and employee benefits an additional $24,537 for the period from August 1, 1975, to July 31, 1976, Holmes has operated the franchised store from November 15, 1976, to July 31, 1977, at a salary and wage cost of $81,687, with employee benefits

costing only $1,988. While these figures do not, of course, represent equivalent time periods, they are indicative of drastically reduced costs in this area, with approximately the same number of employees working at the store during both time periods.[15] Operating the store in essentially the same manner as it had previously functioned under Big Bear, Holmes has succeeded through these operating cost reductions in transforming the store from a losing operation to one which earned a net operating income in excess of $30,000 for the first 8½ months of its fiscal year, as reflected in the instant record.

We agree with the General Counsel that the foregoing shows that Respondent's real purpose behind the entire arrangement was to retain for itself control of the La Mesa operation while, through the appearance of a bona fide franchise agreement, achieving a reduction in labor costs through the avoidance of the economic obligations imposed by its collective-bargaining agreements with Local 1222 and Local 229. Further evidence that Big Bear's real objective was simply to oust the Unions from its La Mesa store is, as the General Counsel argues, found in the manner in which it rid that store of those employees which had been represented by the Unions. Thus, those employees were given no option to continue at La Mesa but were, without any consideration apparently being given to their choice in the matter, transferred to other Big Bear stores. This was done with respect to employees represented by Local 1222 despite that Union's contract with Big Bear requiring, as noted above, that in the event of a store's transfer or sale an employee be given 7 days to choose between applying for a job with

15 The parties have stipulated that prior to November 15, 1976, there were 12 employees at the store, and that the number of employees of Holmes at the store after that date was 13. At the time of the hearing, Holmes testified, the store had 16 employees.

the new owner or moving to another of Respondent's stores.[16] Such preemptory transferring out ostensibly would obviate the possibility that Holmes would be a successor employer obliged, despite even a bona fide franchising, to recognize and bargain with the Unions.

Therefore, in view of all the foregoing, including, *inter alia*, the selection of Richard Holmes, a close relative of high management, as the purported franchisee; the controls retained and exercised by Big Bear over the store's operation; and the economic realities of the arrangement reflected in the franchise agreement whereby Holmes initially invested only $2,000 cash and Big Bear finances the store's operation without charging interest to Holmes, we conclude, contrary to the Administrative Law Judge, that the arrangement between Big Bear and Holmes was not a bona fide franchising transaction, but rather that Holmes' position was essentially that of a manager of,[17] and that he was in fact Respondent's *alter ego* with respect to, the La Mesa store.[18] Accordingly, we find that Richard Holmes and Respondent constitute a single employer within the meaning of Section 2(2) of the Act, and that employees of the La Mesa store are employees of Respondent and part of the bargaining units covered

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16 See fn. 5, *supra.*

17 As noted above Holmes' "guaranteed" minimum income under the "franchising" arrangement was substantially the same as that earned by managers of Respondent's other stores.

18 The record indicates that control over labor relations with the new La Mesa store employees existed essentially in Richard Holmes. While we have regarded the control which one party exercises over the labor relations policy of another to be an important factor in deciding whether a franchisee is an independent contractor or a single or joint employer with it franchisor, our application of that criterion has been premised upon the existence of a bona fide, arm's-length franchising relationship between the contracting parties. See *The Southland Corporation, d/b/a Speedee 7-Eleven, supra.* Here, based upon a consideration of all the factors present in this case, we cannot, as concluded above, find that Richard Holmes and Big Bear entered into such a bona fide, arm's-length franchising relationship.

by Respondent's collective-bargaining agreements with Local 1222 and Local 229.

Therefore, by withdrawing recognition from and refusing to recognize Local 1222 and Local 229 as the collective-bargaining representatives of the employees in the separate units at the La Mesa store on and after November 15, 1976, and by refusing at such times to apply the terms of the collective-bargaining agreements to such employees, thereby unilaterally changing the terms and the conditions of employment specified in the applicable collective-bargaining agreements, Respondent violated Section 8(a)(5) and (1) of the Act. Respondent additionally violated Section 8(a)(5) and (1) of the Act by refusing to furnish information to Local 1222 when that Union requested names and addresses of its bargaining unit employees at the La Mesa store from Respondent's *alter ego,* Richard Holmes. Finally, by transferring employees at the La Mesa store to other stores because of their representation by Local 1222 and Local 229, Respondent violated Section 8(a)(3) and (1) of the Act as well.[19]

Conclusions of Law

1. Respondent Big Bear Supermarkets #3 and its *alter ego,* Richard Holmes, constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Richard Holmes is the *alter ego* of Big Bear Supermarkets #3 in the operation of Respondent's Big Bear store 13, located in La Mesa, California.

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19 Inasmuch as we have found that Big Bear Supermarkets #3 and Richard Holmes are a single employer, and Respondent's union contracts provide for employee transfers between stores within the multistore bargaining units without prior consultation with the Unions, we do not find the transfers violated Sec. 8(a)(5) of the Act.

3. Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

4. All employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, effective from July 28, 1975, to July 30, 1978, at its retail grocery and meat markets in San Diego County, including the La Mesa store, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[20]

5. Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. All employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richrd Holmes, in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, effective from November 8, 1976, to Novem-

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20 We have adopted herein the description of the appropriate unit for collective bargaining as described in the amended complaint and stipulated to by the parties in this proceeding.

ber 4, 1979, at its retail grocery and meat markets in San Diego County, including the La Mesa store, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[21]

7. Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

8. By refusing since on or about November 15, 1976, to bargain collectively with the Unions as the exclusive bargaining representatives of the employees in the aforesaid separate units, by withdrawing recognition from and refusing to recognize Local 1222 and Local 229 as the exclusive bargaining representatives of the employees in the separate units at the La Mesa store, by refusing to apply the collective-bargaining agreements with these Unions to such unit employees, thereby unilaterally changing the terms and conditions of employment established by its collective-bargaining agreements, and by refusing to furnish Local 1222 with the names and addresses of bargaining unit employees at the La Mesa store when such information was requested by that Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. By transferring employees of the La Mesa store to other stores within said multistore units because of their union representation at the La Mesa store, Respondent

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21 See fn. 20, *supra*.

has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As we have found that Respondent unlawfully withdrew recognition from and refused to recognize and bargain with Local 1222 and Local 229 as the exclusive representatives of the La Mesa store employees in their respective bargaining units, we shall order Respondent to recognize and bargain with the Unions as the representatives of Respondent's employees in those units at the La Mesa store. Having also found that Respondent unlawfully refused to apply the collective-bargaining agreements with these Unions to the unit employees at the La Mesa store, thereby unilaterally changing the terms and conditions of employment specified in its collective-bargaining agreements, we shall also order Respondent to restore the *status quo ante* by applying the terms and conditions of the current collective-bargaining agreements with these Unions to the La Mesa store employees, retroactive to November 15, 1976, and to make the La Mesa store employees whole for any losses suffered as a result of Respondent's failure to apply the collective-bargaining agreements to them, with interest to be computed in the

manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[22]

We shall also order Respondent to supply Local 1222 with the names and addresses of its La Mesa store bargaining unit employees, as requested by that Union, as well. Furthermore, as we have found that Respondent discriminately transferred La Mesa store employees to other stores within the multistore bargaining units because of their union representation, we shall order Respondent to offer the employees who were transferred out of the La Mesa store immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to these positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and to make whole the transferred employees or any other unit employees[23] for any losses they may have suffered as a result of the unlawful transfers. All such losses are to be reimbursed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation, supra.*

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22 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

23 Local 1222 has asserted that the transfer of the La Mesa store employees to other stores within the multistore bargaining unit resulted in layoffs and reductions in hours of unit employees at these other stores. The Administrative Law Judge, while noting this general assertion, found insufficient record evidence to support such a finding. Inasmuch as we have found Respondent's transfer of union-represented employees from the La Mesa store to be unlawful, any unit employees at other Big Bear stores of Respondent within the bargaining units represented by either Local 1222 or Local 229 who in fact suffered losses as a result of Respondent's unlawful conduct are entitled to be made whole for such losses. Whether or not such losses occurred, or their extent, is a matter which can properly be resolved at the compliance stage of this proceeding. We shall, however, include in our Order herein a provision requiring that the Notice to Employees be posted at all Big Bear stores of Respondent in the bargaining units, in order that any unit employees who may have suffered losses as a result of Respondent's unlawful employee transfers may thereby be apprised of their right to be made whole.

Finally, inasmuch as Respondent's unlawful conduct was for the purpose of avoiding and evading its collective-bargaining obligations, we regard such conduct as antithetical to the entire collective-bargaining process and, thus, to a primary policy of the Act. Accordingly, we shall order that Respondent cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, La Mesa, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Union, AFL-CIO, and Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein referred to as Local 1222 and Local 229, respectively, as the exclusive bargaining representatives of the employees in the units set forth in their respective collective-bargaining agreements with Respondent, including the unit employees at the La Mesa store, by withdrawing recognition from and refusing to recognize those Unions as the exclusive bargaining representatives of the employees in the separate units at the La Mesa store.

(b) Unilaterally changing the terms and conditions of employment established by its collective-bargaining

agreements with the aforesaid Unions by refusing to apply the terms of collective-bargaining agreements with those Unions to its employees in the separate units at the La Mesa store.

(c) Refusing to furnish to Local 1222 the names and addresses of employees included in its bargaining unit at the La Mesa store as requested by that Union.

(d) Transferring employees of the La Mesa store to other stores within the multistore units because they are represented by the Unions.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and bargain collectively with Local 1222 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with that Union, effective from July 28, 1975, to July 30, 1978, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(b) Recognize and bargain collectively with Local 229 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with that Union,

effective from November 8, 1976, to November 4, 1979, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(c) Make the employees at the La Mesa store in the aforesaid units whole for any losses they may have suffered since November 15, 1976, as a result of Respondent's failure to apply to collective-bargaining agreements to them, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Supply Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store, as requested by it.

(e) Offer employees of the La Mesa store who were transferred to other stores of Respondent within the multistore bargaining units immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to those positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and make whole the transferred employees or any other unit employees for any losses they may have suffered as a result of Respondent's unlawful transfers in the manner set forth in the section of this Decision entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at all its Big Bear Supermarkets in San Diego County, California, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C. November 1, 1978

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

24 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing at which all parties were given an opportunity to present evidence and argument, that we violated the National Labor Relations Act, we notify you that:

WE WILL NOT refuse to bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, as the exclusive bargaining representatives of our employees in the units set forth in our collective-bargaining agreements with these Unions, including the unit employees at the La Mesa store.

WE WILL NOT unilaterally change wages, working conditions, or terms of employment established by our collective-bargaining agreements with these Unions by refusing to apply the terms of our collective-bargaining agreements to our employees in the separate units at the La Mesa store.

WE WILL NOT refuse to furnish Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store.

WE WILL NOT transfer employees of the La Mesa store to other Big Bear markets because of their union representation.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL recognize and bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees at the La Mesa store in a unit of all hourly employees working in the job classfications enumerated in our collective-bargaining agreement with that Union, effective from July 28, 1975, to July 30, 1978, at our retail grocery and meat markets in San Diego County, and will apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

WE WILL recognize and bargain collectively with Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, as the exclusive representative of the employees at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in our collective-bargaining agreement with that Union, effective from November 8, 1976, to November 4, 1979, at our retail grocery and meat markets in San Diego County, and will apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

WE WILL make the employees at the La Mesa store in the aforesaid units whole for any losses they may have suffered since November 15, 1976, as a result of our not applying the collective-bargaining agreements to them, with interest.

WE WILL supply Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store, as requested by it.

WE WILL offer employees of the La Mesa store whom we transferred to other Big Bear markets because of their union representation immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to those positions since November 15, 1976, without prejudice to their seniority or other rights and privileges.

WE WILL make whole the employees we transferred from the La Mesa store, and any other bargaining unit employees at the stores they were transferred to who may have been laid off or had their hours of work reduced, for any losses they may have suffered as a result of our transferring the union-represented employees from the La Mesa store, with interest.

BIG BEAR SUPERMARKETS #3
(Employer)

Dated.....

By.....
(Representative) (Title)

RICHARD HOLMES
(Employer)

Dated.....

By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, California 90014, Telephone 213-688-5229.

TRANSCONTINENTAL THEATERS —

Decision of NLRB

TRANSCONTINENTAL THEATERS, INC.; DOUGLAS KRUTILEK AND ROBERT SHAW, A PARTNERSHIP d/b/a CYNATRON ENTERPRISES, Fremont, Calif. and INTERNATIONAL ASSOCIATION OF THEATRICAL AND STAGE EMPLOYEES, LOCAL 169 and SERVICE EMPLOYEES INTERNATIONAL UNION, THEATER JANITORS UNION, LOCAL 121, Case Nos. 20-CA-8801, and -8886, March 17, 1975, 216 NLRB No. 187

Bernard T. Hopkins, for General Counsel; George King (Boornazian, King & Schulze), for Transcontinental Theaters; James C. Snell (Broun, Norris, King, Graaskamp & Snell), for Cynatron Enterprises; Michael B. Roger (Levy, Van Bourg & Hackler), for unions; Administrative Law Judge Jerrold H. Shapiro.

Before Fanning, Jenkins, and Kennedy, Members.

EMPLOYER Sec. 2(2)

— Lease arrangement — Sole employer ►44.114

Corporation that leased movie theater to partnership was sole employer of theater's employees, there being no evidence that partnership was sole employer of employees, or that corporation and partnership were joint employers. (1) "Lease" to partnership was merely business arrangement by which corporation sought to place operation in more profitable position, through reduction of labor costs; (2) corporation retained control over theater's operations and partnership's labor relations policies, no money considerations were involved in "lease"

arrangement, and corporation was to benefit from whatever profits might result from arrangement; (3) individuals who comprised partnership were employees of corporation, or at best its agents or managers.

DISCRIMINATION Sec. 8(a)(3) REFUSAL TO BARGAIN Sec. 8(a)(5)

— Discharges — Unilateral action ► 52.241 ► 54.651

Corporation that retained control over movie theater following its "lease" of theater to partnership, violated Section 8(a)(3) of LMRA when partnership terminated two projectionists and two janitors because of their rates of pay, which are determined by their union membership, where corporation was sole employer of theater's employees. Corporation also violated Section 8(a)(5) of Act when, without notice to unions which had collective bargaining contracts with corporation covering theater's employees, it unilaterally changed employees' terms and conditions of employment.

(*Text*) The facts, may be summarized as follows: Respondent Transcontinental Theaters, Inc., herein called Transcontinental, is engaged in the operation of motion picture theaters in various States, including California. It operates eight theaters in the San Francisco Bay area. The theater in issue in this proceeding is the twin-screened theater in Fremont, near San Francisco, known as Showcase Cinemas I and II.

International Association of Theatrical and Stage Employees, Local 169, herein called Local 169, and Respondent Transcontinental are parties to a collective-bargaining agreement covering this theater, as well as its other

theaters, running from August 15, 1972, to August 14, 1976. Pursuant to that agreement Local 169 furnishes the Fremont theater two projectionists: the chief projectionist who works 35 hours per week, and a relief projectionist who works a total of 18 hours. Service Employees International Union, Theater Janitors Union Local 121, herein called Local 121, has a similar contract with Respondent Transcontinental which provides that it employ two janitors who collectively work a total of 42 hours a week. Local 121's agreement with Respondent Transcontinental has a term which runs from February 15, 1973, to February 14, 1976.

The record shows that the Fremont theater since its opening in early 1971 operated at a loss which in fiscal 1973 grew to $46,182. The largest single operating expenses were the theater's labor costs or house salaries. Because of these losses Respondent Transcontinental decided to sublease the theater and had discussions, beginning around October 20, 1973, with two individuals, Shaw and Krutilek, to take over its operations and run the business as a partnership pursuant to a sublease with Transcontinental Theaters, Inc. Shaw and Krutilek were licensed as a partnership on November 14, 1973, to do business under the name of Cynatron Enterprises, herein called Cynatron. No capital was invested and no deposit on theater equipment was required. The record indicates that a consideration in giving the sublease to Cynatron was the representation by Krutilek that the partnership was capable of running the theater with lower labor costs, and that the partners were capable of working as projectionists.

Respondent Transcontinental, by letter dated November 7, outlined the conditions and terms under which

Cynatron would operate the Fremont theater. Cynatron accepted Transcontinental's terms by the signatures of Krutilek and Shaw on November 12. On the same day Respondent Transcontinental, by letters dated November 12, 1973, advised Local 169 and Local 121 that the Fremont theater had been leased to Cynatron effective November 28, and indicated that such notice was being made pursuant to contract provisions in the collective-bargaining agreements covering termination of employees. The letters of November 12 constituted the first and only notice the Unions had of Transcontinental's decision to lease the Fremont location to Cynatron.

On November 26, 1973, Respondent Transcontinental executed the sublease agreement and on November 28, as scheduled Cynatron took over the operation of the Fremont theater. On the same day the two projectionists and two janitors covered by the Union's collective-bargaining contracts with Transcontinental were terminated.

The Unions made no effort to communicate with Transcontinental between November 12, the date of the above notification, and November 28. There was communication between the Unions and Cynatron. The Unions took the position with Cynatron that Transcontinental still owned the theater and was responsible for implementation of the terms and conditions of employment as reflected in the outstanding collective-bargaining agreements, and that Transcontinental and Cynatron were not separate legal entities, but partners in the operation of the theater and bound by the existing contracts. Cynatron rejected the Unions' contentions. Pickets from both Unions appeared November 29, 1973, and were still engaged in picketing the theater the day of the trial.

A key operative fact in this case is the formal sublease entered into by the Respondents on November 26, 1973, and the provisions included therein. The Respondents rely upon the sublease in question to show that Cynatron Enterprises thereafter became the employer. The Unions rely upon the subleases to support its contention that Transcontinental had not legally divested itself from operating and controlling the Fremont theater.[1]

The term of the sublease was for one year, November 28, 1973, through November 26, 1974, with renewal provisions. Its approximately 40 numbered sections contain the standard provisions usually found in a sublease agreement, plus the following, in an attached Exhibit A, indicating a special relationship between the parties:

Section 33 provides that Transcontinental could terminate the sublease upon seven days' notice to Cynatron if, in Transcontinental's judgment, Cynatron was not operating the theater in a proper and businesslike manner or was not producing sufficient income.

Section 34 required that Cynatron pay to Transcontinental $3,400 rent per month; five percent of the box office admissions and receipts over and above the monthly rental; and five percent of the gross receipts from the sale of merchandise, food, and drinks; and, as additional rental, Cynatron had to pay to Transcontinental every four or five weeks an amount equal to 75 percent of the net profits as determined by Transcontinental.

Section 35 required a ceiling on the weekly salaries that Krutilek and Shaw could draw, and the amount was required to be considered as operating expenses.

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1 A preexisting lease remained in existence between Fremont Meadows, Inc., owner of the shopping center where the theater is located, as lessor, and Transcontinental as lessee.

Section 36 reserved to Transcontinental the power to assist Cynatron in buying and booking films and determining the programming until Cynatron acquired the experience to do this on its own.

Other sections of the sublease provided that Transcontinental would determine the forms on which Cynatron maintained its daily reports; Transcontinental had the right to enter the theater at all reasonable times to determine whether it was being properly maintained and run; in the event that Cynatron did not promptly pay all obligations incurred in the operation of the theater, Transcontinental had the right to terminate the sublease.

The sublease became effective on November 28, 1974. Cynatron has hired eight employees since its operation began, but no projectionists. Krutilek and Shaw operate the projectors and each draw $200 a week in salary. They retain a part-time janitorial service at $120 a week. Contrary to Transcontinental's situation, Cynatron's major expense is film rental, rather than labor costs, because of the considerable wage savings it has effected in the cost of projection and janitorial labor.

The Administrative Law Judge concluded essentially on the basis of the above factors that Transcontinental and Cynatron were not joint employers, and that Cynatron was the sole employer at the Fremont theater. In reaching this conclusion the Administrative Law Judge placed major emphasis on his finding that Transcontinental "neither exercises actual, nor possesses potential, control over the Theater's labor relations under the sublease agreement or otherwise." Additionally, he found that Cynatron does not meet the Board's applicable jurisdictional standard, he recommended that those portions of

the consolidated complaint which alleged that Cynatron violated the Act be dismissed in their entirety.

As for the allegations involving Transcontinental, the Administrative Law Judge found no basis for concluding that, in subleasing the theater to Cynatron, Transcontinental was unlawfully motivated. He found that the transaction was based upon business considerations lacking in union animus. Accordingly, he recommended that the portions of the consolidated complaint which alleged that Transcontinental violated Section 8(a)(3) and (1) of the Act by subleasing the Fremont theater, which resulted in the termination of employees represented by Unions, be dismissed.

As for the allegation that Transcontinental violated Section 8(a)(5) and (1) of the Act by not giving the Union "prior notice and a prior opportunity to bargain about the decision to cease operating the Theater and the effects of that decision." the Administrative Law Judge found that the Unions had in effect slept on their rights by never testing Transcontinental's willingness to satisfy its bargaining obligation in this respect. He rejected the Unions' position that Transcontinental continued to operate the theater and the Unions' contracts continued to apply to the operation. He, therefore, recommended dismissal of that portion of the consolidated complaint alleging that Respondent Transcontinental refused to bargain regarding the changed method in operating the Fremont theater.

Contrary to the Administrative Law Judge, we are unable to conclude that Krutilek and Shaw, doing business as Cynatron Enterprises, are independent employers whose business relationships are divorced from Transcontinental.

In our opinion the conclusion is inescapable that the sublease allows Transcontinental to maintain close and substantial control over Cynatron's day-to-day operations, and permits Krutilek and Shaw little leeway to assume the role of entrepreneurs. We find significant that in subleasing the Fremont theater the so-called partners were required to pay no money or put up any deposit on the equipment. We note that the sublease closely circumscribes how much profit Cynatron is permitted to make by providing that Transcontinental, in addition to rental payments and commissions on sales of candy and refreshments, shall receive every four or five weeks an amount equal to 75 percent of the net profits unilaterally determined by Transcontinental. Moreover, Transcontinental under the sublease provides the forms on which Cynatron must maintain its daily reports, which ties Cynatron's bookkeeping in with its own, and also reserves the right to assist Cynatron in buying and booking films and determining programs. In short, Transcontinental has not relinquished its economic control and interest in the theater.

As for Transcontinental's control over Cynatron's labor relations, we disagree with the Administrative Law Judge's conclusion that its power in this respect is "too remote and conjectural to warrant a finding that Transcontinental has any meaningful control over Cynatron's labor relations policies" The record is clear that the primary reason for Transcontinental's decision to sublease the Fremont theater was that it was an unprofitable venture, and that a major cause for this condition was its high labor costs as a percentage of operating expenses. A factor in the high labor costs was the wages and manning requirements provided under its collective-bargaining contracts.

In deciding to sublease the Fremont theater to Shaw and Krutilek, as noted above, a consideration was that they were qualified to take over the work of the projectionists, a major labor cost item. The Respondent undoubtedly knew, as did Shaw and Krutilek, that profitable operation of the Fremont theater was more feasible with lower wage scales and manning requirements than were permitted under Transcontinental's existing collective-bargaining contracts. We find relevant in this regard that Transcontinental in its sublease placed a ceiling upon Cynatron's operating costs and required the partnership to operate the theater within a mutually acceptable operating budget which included a ceiling on the weekly salary that Shaw and Krutilek could draw.

Thus, the ceiling on wages which Cynatron could pay was strictly limited. Indeed, the close control over Cynatron's operations and labor costs is indicated by the provision in the sublease that Transcontinental can cancel the sublease upon a mere 1 week's notice whenever the operation was not being operated in a "proper and businesslike" manner. The definition and determination as to the meaning of "proper and businesslike," like other restrictions in the sublease, is unilaterally decided upon by Transcontinental. It was to meet the requirements of Transcontinental that one of Cynatron's first moves was to take over the work in the projection room, and hire part-time janitors on a contract basis.

Accordingly, we are unable to agree with our dissenting colleague that Cynatron is an independent business entity, and that Cyntron and Transcontinental operated on an "arm's-length" basis. It seems plain to us that the economic realities and purposes of the relationship, its substance as distinguished from the form which our

colleague emphasizes, establish an almost complete lack of independence in Cynatron.

It is clear, as noted above, that the main consideration, and probably the only consideration, for the subleasing of the Fremont theater to Shaw and Krutilek was to relieve Transcontinental of the high union labor costs in running the theater. The selection of Shaw and Krutilek over other applicants was admittedly based upon the fact that both were qualified to take over the work of the union projectionists, a major cost item. In this regard we find significant that neither Shaw nor Krutilek had ever before operated a theater on their own, and in "leasing" the Fremont operation no monetary consideration was involved. Indeed, Shaw and Krutilek were not even required to make a deposit or post a bond to cover the property with which they were entrusted and over which Transcontinental maintained its own ownership or leasehold.

As described above, Transcontinental by maintaining a right to impose a ceiling on operating expenditures, particularly labor costs, retained power to (supervise and) oversee the operation of the Fremont theater. This limited not only the number and kinds of employees who could be hired, but also the size of the labor budget. The record does not support our dissenting colleague's statement "that Cynatron's work force is completely controlled by Cynatron alone." Krutilek frankly and forthrightly testified that if Cynatron felt the need to hire more personnel and increase the cost of the payroll above the salary figure established in the lease it would have to inform Transcontinental and receive its permission. This has never been an issue only because Cynatron has managed

to keep its labor costs within the range permitted by the lease.

Nor can we dismiss, as does our dissenting colleague, the "sublease" as merely the usual type leasehold arrangement between a lessor and leasee. The Exhibit A provisions, attached to the approximately 40 standard provisions (specifications) specifically show the close relationship and ties which Transcontinental maintains with Cynatron.

Through the special sublease provisions, Transcontinental enjoys control and meaningful supervision over the Fremont theater's operations, and at the same time is relieved of the manning requirements and the burdensome wage scales of the Unions' contracts.[2] It is apparent from an analysis of the "sublease" arrangement that Krutilek and Shaw in fact and economic reality operate the theater for Transcontinental on the basis of a salary plus a commission, consisting of a fraction of the profits, both carefully spelled out in the "sublease."

Based upon the above considerations and the record as a whole, we see no evidence that Cynatron was an

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2 The cases cited in the dissent to support its position do not appear relevant to the factual situation involved here. For example. The Southland Corporation, d/b/a Speedee 7-Eleven, 170 NLRB 1332, 67 LRRM 1582 (1968), on which the major reliance is placed has numerous operative facts not present here: (1) Southland, the franchisor, and George, the franchisee, entered into a *standard franchise agreement* which Southland had with a number of its other franchised retail grocery stores in the State of California; (2) the franchisee was *required* to provide the operational capital and inventory, and a substantial amount of the franchise cost must have been in cash; (3) under the franchise agreement, *exclusive* control over labor relations was vested in the franchisee; (4) the amount store operators were permitted to draw against anticipated profits was not subject to Southland's control; (5) although Southland issued directives, manuals, guidebooks, pricing suggestions, and wage and personnel suggestions, whether such information was followed *was left to the business judgment of the franchisee;* and (6) Southland had power to terminate the relationship without cause only upon a *full 30 days' notice.*

independent employer, nor that Shaw and Krutilek were in any sense entrepreneurs. Moreover, in our opinion the record does not demonstrate that Cynatron and Transcontinental reached the status of joint employers.

The "lease" by Transcontinental was a business arrangement, the principal consequence of which was to allow Cynatron, or Shaw and Krutilek, to perform labor services for Transcontinental at the theater under conditions which were not possible under the collective-bargaining contracts with the Unions. Contrary to the Administrative Law Judge, we find that there has been no arm's-length removal of the operation of the Fremont theater from Transcontinental. Instead, what has been accomplished is merely an arrangement in which Transcontinental was able to control the operations of the Fremont theater, receive the benefits of substantially lower labor cost, and not be deprived of the profits which might result.

Accordingly, we find that Transcontinental never relinquished its ownership of the Fremont theater, and that its relationship with Cynatron was merely an arrangement by which it sought to place the operation in a more profitable position, through the reduction of labor costs. In our view Transcontinental continued to operate the theater, and Shaw and Krutilek were its employees, or contracts with the Unions continued to be operable. Cynatron, therefore, was obligated to abide by the contracts' terms.

Accordingly, when Local 169 and Local 121 were notified on November 12, 1973, of Transcontinental's decision to lease the Fremont theater to Cynatron under the circumstances herein described, the Unions were not

required to bargain over what was a *fait accompli*. Transcontinental's actions amounted to a unilateral change of wages and working conditions under the existing contracts with the Unions, since the contracts' provisions equally applied whether the Fremont theater was to be run by Transcontinental or through a working arrangement with Cynatron.

Contrary to the Administrative Law Judge, we find, therefore, that Transcontinental's conduct thereby violated Section 8(a)(5) of the Act. Moreover, we further find that the termination, on November 28, of the two projectionists covered by Local 169's contract and the two janitorial employees covered by Local 121's contract as a result of this illegal conduct violated Section 8(a)(3) and (1) of the Act. It is clear that the two projectionists and two janitors were terminated because their rates of pay were determined and affected by their membership in a labor organization.

In view of the above, we find that Respondent Transcontinental failed to bargain in good faith with respect to the arrangements made with Cynatron in regard to the changed operations of the Fremont theater, and thereby violated Section 8(a)(5) and (1) of the Act. We also find that the termination of employees as a result of this illegal conduct violated Section 8(a)(3) and (1) of the Act.

Order: Cease and desist from refusing to bargain with union; discriminating against employees because such employees are covered by unions' contract; in any like or related manner interfering with employees' LMRA rights. Bargain collectively with unions; offer terminated em-

ployees reinstatement and make them whole for their lost earnings; post notice.

KENNEDY, Member, dissenting:

(*Text*) I do not agree with my colleagues that the evidence supports a finding that Respondent Transcontinental Thethers, Inc., and Respondent Cynatron Enterprises are a single business enterprise. The General Counsel lacked the temerity to make that allegation in the complaint or at the hearing, advancing instead the contention that these two Respondents are a joint employer. The General Counsel contends that Respondents are joint employers of the employees employed at the Showcase Cinemas I and II located in Fremont, California, because Respondent Transcontinental allegedly controls Respondent Cynatron's labor policy vis-a-vis Cynatron's employees. Unless that is true, this Board has no jurisdiction over Respondent Cynatron and cannot pass upon Cynatron's conduct in this matter. The Administrative Law Judge in his well-reasoned Decision found this not proven, and therefore dismissed the charges pendent thereon, as well as the other charges for which he found no evidence extant to support them.[4] I agree fully with his analysis and would adopt his recommendation that the complaint be dismissed in its entirety.

Respondent Transcontinental is a corporation which operates 103 movie theaters in California and other States. In 1970 it began to operate a theater in Fremont,

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4 Since the majority finds that the two Respondents are a single business entity, i.e., that the Cynatron partnership members are "employees" of Transcontinental, the majority is thereby able to find 8(a)(3) and (5) violations simply on the basis of a "replacement" of the union employees at the theater with the general partners.

California, pursuant to a 25-year lease. At the close of its fiscal year on June 30, 1971, Transcontinental realized on the operation of the theater a net loss before depreciation of $3,215; in 1972, a loss of $2,862; and in 1973, a loss of $46,182. Because of this loss, Transcontinental made a decision, not unusual in its industry, to sublease the theater. After receiving several offers, on November 28, 1972, Transcontinental subleased the theater to Cynatron Enterprises.

Cynatron is a general business partnership composed of partners Douglas Krutilek and Robert Shaw.[5] The partnership is licensed as such to do business under the California Civil Code. Cynatron began operating the theater on November 28 pursuant to its sublease from Transcontinental.

The majority finds that certain provisions of the sublease prove that the Cynatron partners are the employees of Transcontinental. In my view, none of these provisions satisfy the tests set forth in Board and court precedent which would warrant a finding of single-employer status here.

The Board will treat separate entities as one employer where their operation and ownership are highly integrated. Principal factors which must be considered in resolving this question are interrelation of operation, common management, centralized control of labor relations, and common ownership of financial control. Sakrete of Northern California, Inc., 137 NLRB 1220, 50 LRRM 1343 (1962), enfd. 332 F.2d 902, 56 LRRM 2373 (C.A. 9, 1964), cert. denied 379 U.S. 961, 58 LRRM 2192

5 They had never had an employment or business relationship with Transcontinental before the events herein occurred.

(1965). None of these factors is controlling, but emphasis is placed upon operational interrelationship, common management, and central control of labor relations. Drapery Manufacturing Co., Inc., 166 NLRB 805, 65 LRRM 1655 (1967). Just recently, in Gerace Construction Inc., 193 NLRB 645, 78 LRRM 1367, 1368 (1971), the Board held:

"A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies.[1] Thus, the Board has found common ownership not determinative where requisite common control was not shown,[2] and the Board has held with court approval that such common control must be actual or active as distinguished from potential control.[3]" [6]

"[1]N.L.R.B. v. Condenser Corporation, 128 F2d 67, 71, 10 LRRM 483. See also J. Howard Jenks, d/b/a Glendora Plumbing, 165 NLRB 101, 65 LRRM 1228; L & S Construction Company, Inc., 155 NLRB 524, 60 LRRM 1353; AAA Electric, Inc. and Simms Electric Co., 190 NLRB 247, 77 LRRM 1169.

"[2]Joe Robertson & Son, Inc., 174 NLRB 1073, 70 LRRM 1396; Bel-Air Door, et al., 150 NLRB 481, 58 LRRM 1109.

"[3]Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.), 185 NLRB 303, 75 LRRM 1014 enfd,

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6 Indeed, the Board has held, with court approval, that separate corporate subsidiaries are separate persons, if neither the subsidiaries nor the parent exercises *actual*, as opposed to potential, control over the day-to-day operations or labor relations of the other. Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.), 185 NLRB 303, 75 LRRM 1014 (1970); Knight Newspapers, 138 NLRB 1346, 51 LRRM 1169 (1962), enfd. sub. nom. Miami Newspaper Printing Pressmen's Local No. 46 v. N.L.R.B., 322 F.2d 405, 53 LRRM 2629 (C.A.D.C., 1961).

443 F.2d 1173, 77 LRRM 2895 (C.A. 9); Poole's Warehousing, Inc., 158 NLRB 1281, 62 LRRM 1197; Miami Newspaper Printing Pressmen's Local 46 v. N.L.R.B., 322 F.2d 405, 53 LRRM 2629 (C.A.D.C.).

In the instant case the record is clear that there is no common ownership. Cynatron has no investment in, no representation in, nor stock in Transcontinental. And Transcontinental has no ownership interest in the general partnership of Krutilek and Shaw. As for common management, there is none in the day-to-day operations of the theater. Cynatron supplies Transcontinental with daily reports on forms prescribed by Transcontinental so that Transcontinental can comply with the requirement of its master lease in giving the same reports to the owner of the theater, but only Cynatron controls the composing of those reports and their content. Transcontinental may inspect the theater to see if it is properly run, but it does not appear that it has ever done so. Transcontinental also may terminate the lease upon seven days' notice if it is not run in a businesslike manner, or if Cynatron does not pay its obligations. But as the sublease expressly provides, Cynatron is solely responsible for its debts. Thus, all that the termination rights give Transcontinental is the right, if necessary, to rid itself of a failing and/or insolvent tenant. There is no evidence that Transcontinental has ever used this power to gain an active role in the day-to-day management of the theater. Furthermore, the sublease is for a full one-year term, a substantial leasehold. As the Board stated in Clark Oil & Refining Corporation, 129 NLRB 750, 47 LRRM 1056 (1960), the power to terminate on short notice because in the grantor's view the grantee is conducting an unsatisfactory operation still leaves a substantial tenancy, a condition not usually at-

tached to master-servant relations, and one which does not negate independent contractor status.

The sublease also reserves to Transcontinental the power to *assist* Cynatron in renting films and determining programming until Cynatron acquired sufficient experience. This did not give Transcontinental the power to require Cynatron to follow its desires in this regard, nor is there any evidence that Transcontinental ever attempted to do so. Furthermore, as the Administrative Law Judge found, Cynatron in fact bids for and books its own films. This is a significant managerial task, since Cynatron must compete with numerous area theaters when bidding to the film companies for such items as first-run rights on particularly popular films.

Respondent Transcontinental and Respondent Cynatron do not share financial control of Cynatron. The majority appears to find sections 34 and 35 of the sublease significant here. Section 34 requires Cynatron to pay Transcontinental $3,400 per month plus five percent of the box office admissions and receipts less the guaranteed minimum monthly rental ($3,400), and five percent of the gross sales of merchandise, food, and drink. However, the record reveals that this clause is nothing more than a mirror image of the master lease between Transcontinental and the owner of the shopping center, and is in fact the basic monthly rental of the theater. The profit Transcontinental realizes, if any, is the 75 percent of the *net* profits of the four- or five-week period as determined by Cynatron's operating period. This is where Transcontinental will make a profit on the theater, if it realizes any at all. Contrary to the view of my colleagues, Cynatron's promise to pay 75 percent of its net profits is legally sufficient and substantial consideration, under the

law of contracts, for the right to use Transcontinental equipment and furnishings together with the leasehold rights of occupation and use.

Section 35 of the sublease provides:

"35. Before computing 75 percent of the net operating profits, subleasee shall be allowed to draw the sum of $250 per week as a salary which said sum shall be considered an operating expense of said theater."

The record shows that the operating expense budget, including the amount of Cynatron's partnership salary draw, advertising, etc., is set by mutual negotiation between Cynatron and Transcontinental. Indeed, the first such budget was determined entirely by Cynatron and submitted to and accepted by Transcontinental as reasonable. The budget has been revised several times by Cynatron since the inception of the sublease, with no more formality than simple notification of that fact to Transcontinental.[7] Transcontinental President Lippert testified without contradiction that the operating budget is important only to assure Transcontinental that Cynatron, with whom Transcontinental had had no prior experience, would remain in operation.

The majority contends without citation of authority that on this basis Respondents are a single business enterprise, and that Cynatron has no entrepreneurial status. Such a finding is contrary to the evidence. The Administrative Law Judge found, as the General Counsel alleged in his complaint, that Respondents are separate business entities. Transcontinental has no ownership interest in

7 E.G., the record proves that the adertising budget has gone from $350 to $400 or $500 a week and that the partnership has increased its salaries and granted itself travel allowances.

Cynatron. Cynatron has its own business license, maintains its own bank accounts and books of account, employs its own accountant, purchases its own tax advice, is completely and solely responsible for paying its own operating expenses, sets its own admission prices, and bids for its own films. I know of no case, nor does the majority cite one, where such a business entity has been held by the Board to be "employees." I do know of cases to the opposite effect. In The Southland Corporation, d/b/a Speedee 7-Eleven, 170 NLRB 1332, 67 LRRM 1582 (1968),[8] the Board was faced with two issues: (a) whether Southland, the franchisor and owner of the retail grocery store, and George, an individual, were a single employer (i.e., whether George was an employee of Southland), and (b) whether Southland and George were a *joint* employer, which is what the General Counsel alleged in the instant case. The facts showed that Southland built and owned the store, outfitted it with fixtures and goods, and then leased it to the franchisee George. As here, George paid no cash. Southland provided bookkeeping services and maintained George's bank accounts. George could not withdraw profits below a fixed net worth, and could not take a draw unless he worked in the store. Southland received 55 percent of the adjusted *gross* profits (in the instant case the figure is 75 percent of *net* profits) on the franchise. Despite Southland's policy manual, Southland's retail pricing arrangement, and Southland's right to terminate *without cause* upon 30 days' notice, the Board, including Member Jenkins, found that Southland did not "so control the means by which George operates his store to warrant finding his employees to be employees of Southland. We find George to be an independent contractor."

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8 See also cases cited supra.

In so concluding, the Board found that there was no evidence of centralized control of labor relations; i.e., that Southland had "ever exercised any control over any of the terms of employment of the store employees." So also here, where the record clearly supports the General Counsel's specific allegation in the complaint:

"II. (f) At all times since November 28, 1973 (the effective date of the sublease), Respondent Cynatron has hired, fired, disciplined and supervised the employees employed at the Showcase Cinemas I and II in Fremont, California."

In view of the foregoing, I believe that the Board can reach no conclusion other than that Respondent Transcontinental and Respondent Cynatron are independent contractors and separate employers within the meaning of Section 2(2) and 2(3) of the Act.

There remains the second issue raised in Southland and raised here by the complaint; i.e., whether Transcontinental and Cynatron are *joint* employers. I agree fully with the Administrative Law Judge that they are not. The critical factor in determining whether a joint employer relationship exists is the degree of control which one entity has over the labor relations policy of another.[9] On *this* issue (but not on the single employer issue), the Board stated in Southland, supra, that:

"It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate.[4] In the instant case Southland neither exercises actual, nor possesses potential, control over the store's labor relations

9 S.A.G.E., Inc. of Houston and its Licensees, 146 NLRB 325, 55 LRRM 1297 (1964).

under the franchise agreement. It is undisputed that George alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the store's employees. There is no evidence that the clear language of Article 14 of the franchise agreement granting complete control over store labor relations to the franchise has ever been disregarded by the parties or that Southland has ever sought to interpret the agreement in such a way as to vest in itself the right to influence George's labor relations policies.[5]

"In its brief Petitioner advances the contention that Southland "in practice does keep a check on the number of employees, their hours and wages," by means of Article 21 of the franchise agreement. Article 21 states that it the franchisee's payroll "exceeds 8 percent of net sales for said preceding week, or $200, whichever is greater, the remittance (the owner's weekly draw) may be reduced by the amount of such excess." But it does not require George to reduce the number of hours or wages of its employees.

"We are of the opinion that the impact of this contractual provision upon George's employees is too remote and conjectural to warrant a finding that Southland has any meaningful control over George's labor relations policies. Moveover, there is no evidence that George has ever been affected by this provision. Indeed, the record shows that George does not even take a draw. Further, even if George did accept a draw it would be sheer speculation to assume that the terms of employment of his employees would in any way be affected by the draw restriction.

"4 Thriftown, Inc., 161 NLRB 603, 63 LRRM 1298. Although in Thriftown the Board found the termination

clause in the parties' agreement to be significant in establishing a joint employer relationship, this was found to be so because of the "special nature of the relationship," i.e., a discount department store in which all the leased departments were under one roof and were held out to the public to be part of an integrated enterprise. Moreover, the lease agreement specifically reserved to Thriftown the right to control its lessees' labor relations, a right which would normally be exercised in order to prevent a dispute involving one lessee from adversely affecting the operation of the entire store.

"5 In this regard it is noteworthy that on one occasion a customer complained to Southland about the conduct of a clerk in George's store. Although a Southland representative suggested to George that the employee be fired, George rejected the suggestion and continued to employ the clerk. Southland thereafter made no attempt to alter George's decision.

"For the foregoing reasons we find on the present record that George and Southland are not joint employers of the store employees within the meaning of the Act. Accordingly, as George is the sole employer and as George's annual retail sales are less than the Board's minimum retail jurisdictional standards, we find that it will not effectuate the policies of the Act to assert jurisdiction herein, and we shall dismiss the petition."

So also do I find here. Again, I refer to the General Counsel's admission that Cynatron hires, fires, disciplines, and supervises its own employees. Furthermore, Cynatron's operating budget limitation is, unlike in Southland, largely self-imposed and altered as Cynatron thinks is required. The record shows that Cynatron's work force is completely controlled by Cynatron alone. Furthermore,

Transcontinental has never attempted to participate in or influence a labor relations decision by Cynatron.

All of which should leave one puzzled as to the reasons for prosecution of this case. But after more than 20 years of legal experience in the regions of this Board, my memory is refreshed by the trial attorney's candid concession on the record that:

"To be absolutely candid, one of the reasons I was having difficulty answering your questions is I have been unable to find the answers myself because some bright legal theoretician in Washington came up with these violations based on case citations from which inferences are drawn."

Principally among these cases appears to be Jackson Manor Nursing Home, Inc., and/or Isaac Mizrahi d/b/a Jackson Manor Nursing Home, Snapper Creek Nursing Home and Arch Nursing Home, 194 NLRB 892, 79 LRRM 1166 (1972). I agree with the Administrative Law Judge that reliance upon Jackson here is unwarranted. The "potential control" which the Board found there existed in fact. The lease agreement there reserved to the lessor the right to be present and to fully participate in collective-bargaining sessions, and required the lessor's approval before execution of any labor contract by the lessee. Jackson Manor is clearly inapposite. The instant case is controlled by Southland, supra, since here there is no evidence of "potential control." In my view Transcontinental and Cynatron are not joint employers of Cynatron's employees.

For all of the foregoing reasons, I would adopt the Administrative Law Judge's well-reasoned Decision, and would dismiss the complaint in its entirety.